No. 11,544

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER AND A. M. LUSTER, partners doing business in the partnership name, SUNBEAM FURNITURE COMPANY,

Appellees.

BRIEF FOR APPELLEES.

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Jurisdiction.

(a) The District Court had jurisdiction over this matter by virtue of Section 8 (e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A., App., Sec. 308(e));

(b) This Court has jurisdiction by virtue of the provisions of the Judicial Code, Section 128(a) First (28 U. S. Code, Sec. 225(a) First).

Statutes Involved.

The applicable statutes involved include:

(a) Section 8 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A., App., Sec. 308; 54 Stat. 890; 50 Stat. 724; 58 Stat. 798, and 60 Stat. 301, 341);

(b) Section 16(b) of said Act, as amended. (50 U. S. C. A., App., Sec. 316(b); 54 Stat. 897; 59 Stat. 166, and 60 Stat. 181, 342); and

(c) Section 7 of the Service Extension Act of 1941, as amended. (50 U. S. C. A., App. Sec. 357; 55 Stat. 627; 58 Stat. 799; and Act of Aug. 6, 1946, Chap. 936, 60 Stat. .....).

Section 8 (b, c. and e) of the Selective Training and Service Act of 1940, *supra,* contains the statutory language which primarily concerns the Court for purposes of this appeal. The pertinent portions thereof are quoted in appellant's brief at pages two and three.

Statement of the Case.

A complete and detailed statement of the case, including pleadings, evidence, specification of error etc., is contained in appellant's brief (pp. 13-27). No useful purpose is served in repeating same or parts thereof other than to comment upon, controvert, or to clarify and add to certain statements made therein by appellant with respect to the evidence.

1. Although Appellant refers to himself as a salesman in the "out of town" territory from December, 1937 to February 26, 1943, and claims to have represented Appellees alone after May-June, 1942 (App. Br. p. 13), it is noteworthy that:

a. Appellant acted as appellees' salesmen in the "out of town" territory only from April, 1942 to February 26, 1943. [R. pp. 3, 24.]

b. That while travelling and acting as appellees' salesman during the above period of time, appellant *had the*

unrestricted right to represent other employers and sell their lines simultaneously and at the same time he sold appellees' products. [R. p. 82.]

c. While appellant contends that the Charles S. Brown company connection ended in May-June, 1942 (App. Br. p. 13), Charles S. Brown testified that appellant was paid commissions by his company even after November 30, 1942. [R. p. 99.]

2. Appellant states that possibly $25,000.00 worth of business had been cancelled by reason of appellees' inability to make delivery of goods. (App. Br. p. 16.) Such statement is unsupported by any proof, is mere opinion, and irrelevant to the issues presented for appeal. For as admitted, commissions were payable only upon shipment and delivery of merchandise ordered [R. pp. 24, App. Br. pp. 24, 54, 64-66.] Hence appellant could not logically claim any commissions whatsoever on cancelled orders, even assuming that there were such cancellations.

3. Appellant's reference to the earnings of Ben Harris (App. Br. p. 16) fails to take into account that even Mr. Harris' commissions were subject to substantial reduction by reason of travelling expenses incurred. Under any or all circumstances, such earnings are no basis or criteria of judging or determining what the appellant could have earned for the same period of time, for, as the District Court so aptly stated:

> "That leads us largely in a field of speculation and again you are confronted with the personal and human element of two salesmen, one of whom might go in the same territory and sell ten times as much merchandise as the other." [R. p. 116.]

4. Appellant stresses critically that the District Court in its oral opinion adhered to the figures in the answer with respect to appellant's earnings, notwithstanding that the parties had stipulated that they were incorrect and that the correct figures appeared on Exhibits "B" and "C." (App. Br. p. 17.) It would appear that the Court's reference to the figures in the answer was inadvertent, unintentional and harmless error. For immediately after such reference, the Court in its oral opinion, accurately and correctly referred to the commissions paid to the appellant in accordance with the said exhibits. [R. p. 114.]

5. While the appellant, both at the time of trial [R. pp. 101-104] and in his brief (App. Br. pp. 17-18) attempts to so arrange and manipulate the amounts and periods of time for which commissions were paid to appellant so as to appear and lead one to infer that appellant had been earning in excess of $600.00 per month, it is submitted that such inference or conclusion is misleading, inaccurate and untrue. The facts with respect to the earnings of appellant are as indicated on exhibit "B" and as stated in the Court's opinion, as follows:

> "In 1941 the total was $282.44 or an average of $23.54 a month. In 1942 the total was $1510.38 or an average of $125.86 per month. In 1943 the total for five months was $1168.60 or an average of $233.72 per month. That is pro rated on the five month period and of course from this would be deducted the expense." [R. p. 114.]

6. By the Appellant's own testimony and admission, his expenses amounted to from $50.00 to $75.00 per week, no part of which were assumed by appellees. [R. pp. 73-74.]

Questions Involved.

Appellees submit that based on the evidence, the District Court's oral opinion, the Judgment, Findings of Fact and Conclusions of Law, there is but one crucial though determinative question presented for purposes of this appeal, namely:

I.

DID THE APPELLANT MILTON R. BROWN PRIOR TO HIS ENTRY INTO MILITARY SERVICE HOLD A POSITION "IN THE EMPLOY" OF APPELLEES WITHIN THE MEANING AND INTENT OF SECTION 8 (b, c, e) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, SO AS TO BE ENTITLED TO THE BENEFITS OF THE RE-EMPLOYMENT PROVISIONS THEREOF?

As stated by the District Court in its oral opinion, "if the petitioner was an employee of the respondent he was entitled to reinstatement. If the petitioner was an independent contractor he was not entitled to be reinstated in the position he held." [R. p. 115.]

Assuming, and in the event that the Court finds that the appellant did hold "a position in the employ" of appellees and by reason thereof was a person entitled to the protection of the Act referred to *supra,* two additional questions are presented for purposes of this appeal:

II.

DID THE GOOD FAITH OFFER ON THE PART OF THE APPELLEES TO GRANT TO APPELLANT THE EXCLUSIVE SALESMANSHIP OF THEIR PRODUCTS IN THE CITY OF LOS ANGELES CONSTITUTE AN OFFER TO RESTORE APPELLANT TO A POSITION OF "LIKE SENIORITY, STATUS AND PAY" AND THUS COMPLY WITH THEIR STATUTORY OBLIGATION TO APPELLANT?

III.

DID APPELLANT INCUR OR SUFFER ANY DAMAGE FOR LOSS OF COMMISSIONS OR PROFITS AS CONTEMPLATED BY SECTION 8 (e) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED?

Summary of Argument.

Appellant has contended that the "District Court's principal reliance was placed on the opinion in Levine v. Berman (D. C., N. D., Illinois, 1946), as indicated by the reference thereto, in the Court's oral opinion." (App. Br. p. 28.) An examination of the reference to this case reveals that as a matter of fact, the District Court placed no reliance whatsoever on that case. The Courts referred to the case by way of comment when it briefly discussed the question of whether or not the offer on the part of appellees to place the appellant in the position of salesman for the city of Los Angeles, was a position of "like seniority, status and pay" as the one previously held by appellant.

The Court's language reads:

> "An interesting case in this connection is Levine v. Berman decided May 8, 1946 in the northern district of Illinois." [R. p. 116.]

Appellees contend that:

I.

The Appellant Milton R. Brown prior to his military service did not hold 'a position in the employ' of appellees within the meaning and intent of Section 8 (b, c, e) of the Selective Training and Service Act of 1940, as amended, and is therefore not entitled to the benefit of the re-employment provisions thereof.

A. The words "position in the employ of a private employer" as used in and intended by the Act do not include nor apply to an "independent contractor."

B. The appellant's status was that of an "independent contractor" and the District Court's finding to this effect was substantially supported by the evidence.

Assuming, and in the event that the Court reverses the District Court in finding that appellant did hold "a position in the employ" of appellees, it is further submitted that:

II.

Appellees' offer in good faith to grant to appellant the exclusive salesmanship of their products in the city of Los Angeles, constituted an offer to restore appellant to a position of "like seniority, status and pay," and thus fulfilled their obligation under the Act.

III.

Appellant has suffered no damage for loss of commissions or profits contemplated by Section 8(e) of the Selective Training and Service Act, of 1940, as amended.

ARGUMENT.

I.

The Appellant Prior to His Entry Into Military Service Did Not Hold a "Position in the Employ" of Appellees Within the Meaning and Intent of Section 8 of the Selective Training and Service Act of 1940, as Amended, and Is Therefore Not Entitled to the Benefit of the Re-Employment Provisions Thereof.

A. The Language "Position in the Employ of a Private Employer", as Used in and Intended by the Act Does Not Include Nor Apply to an "Independent Contractor."

Appellees have no quarrel with the Court's duty to give a liberal construction and interpretation to the re-employment provisions of the Selective Training and Service Act of 1940, as amended, so as to effectuate its purposes. (*Kay v. General Cable Corp.* (3 C. C. A. 1944), 144 F. (2d) 653, 656; *Fishgold v. Sullivan Dry-dock and Repair Corp.* (1946), 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960; *McClayton v. W. B. Cassel Co.,* D. C., Md., 1946, 66 F. Supp. 165.) Appellees contend, however, that such liberal construction should not be carried to the point of doing violence to the language of the act itself. (*Dacey v. Bethlehem Steel Co.,* D. C., Mass. 1946, 66 F. Supp. 161; *Tipper v. Northern Pac. Ry. Co.,* D. C. Wash. 1945, 62 F. Supp. 853.)

It is significant that the Act does not define or explain what specifically was intended by Congress when it used the language "a position in the employ of a private employer." Perhaps the clearest and best interpretation of

the intent of Congress in using such expression is contained in the case of *Kay v. General Cable Corporation* (3 C. C. A. 1944), *supra,* 144 F. (2d) 653, as follows:

> "The status which the statute protects is 'a position * * * in the employ of an employer,' an expression evidently chosen with care. The word "employee" was not used. While it may be assumed that the expression which was adopted is roughly synonymous with "employee," it unmistakably includes employees in superior positions and those whose services involve special skills, as well as ordinary laborers and mechanics. *Of course, the words are not applicable to independent contractors,* but except for casual or temporary workers, who are expressly excluded, they cover every other kind of relationship in which one person renders regular and continuing service to another." (Italics added for emphasis.) (Quoted with approval in *McMillan v. Montecito Country Club* (1946), 65 F. Supp. 240, p. 242.)

"Independent Contractors," in accordance with the foregoing interpretation have been held to be outside the scope of re-employment provisions of the Selective Training and Service Act of 1940, as amended. (*Frank v. Tru-Vue Ins.* (1946, 65 F. Supp. 220, where facts and circumstances of employment relationship bore a striking similarity to those of the instant case; see also *Rosenbaum v. Cico Steel Products Corp.,* D. C., Dist. of Columbia, April, 1947.)

It is submitted that the exclusion of "independent contractors" from the scope and benefit of the Act, is correct both from the standpoint of principle and logic. If Congress had intended to include "independent contractors," it is reasonable to assume that it would have so

expressly provided. The oft quoted maxim *"Expressio Unius est exclusio Alterius"* (Expression of one thing is exclusion of another) is applicable to the statutory language used. (*Ford v. U. S.*, 273 U. S. 593, 71 L. Ed. 793, 47 S. Ct. 531.) To read any other interpretation into the statutory expression is to strain the ordinary and reasonable meaning of the language used.

As an "independent contractor," a veteran, after his discharge from military service is as free to utilize his abilities and contract his services as he was prior to military service, and in this respect at least, he is not and cannot be prejudiced by any action of a person or persons for whom he may have performed a job or a series of jobs in refusing to restore him to such job or jobs. As a matter of economic reality, "independent contractors" can and do perform services simultaneously for any number of employers without restriction. To assert that each and every employer of the services of an "independent contractor" is bound by the Act to restore such "independent contractor" to his former job would have the practical effect of imposing a penalty on the employers and of creating chaos and confusion in our economic society. It would appear much more probable that Congress for very good and sound economic reasons did not include "independent contractors" within the provisions of the Act, and it is submitted that neither public policy nor the broadest possible application or interpretation of the Act permits such inference or conclusion.

B. The Appellant's Status Was That of an "Independent Contractor" and the District Court's Finding to This Effect Was Substantially Supported by the Evidence.

Contrary to appellant's argument that the "word employee, in its broadest connotation, includes an 'independent contractor'" (App. Br. p. 31), appellees submit that such contention is contrary to law and unsupported by case or authority.

The distinction between an agent or employee on the one hand, and an independent contractor is well settled in law. An agent or employee is "one who represents another, called the principal, in dealings with third persons." (*Cal. Civil Code* #2295, Rest. Agency #1.) An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. (*Green v. Soule* (1904), 145 Cal. 96, 99, 78 Pac. 337; *Moody v. Industrical Acc. Comm.* (1928), 204 Cal. 668, 269 Pac. 542, 60 A. L. R. 299; *Calif. Empl. Comm. v. Los Angeles Down Town Shopping News Corp.* (1944), 24 Cal. (2d) 421, 150 P. (2d) 186.)

In determining whether an individual is an employee or an independent contractor, the most significant factor tending to show employment is the right of the employer to control the details of the work, and conversely, freedom from such control tends to establish the relationship of independent contractor. (*Rest.*, Agency #220 (2) (a); *Luckie v. Diamond Coal Co.* (1919), 41 Cal. App. 468, 183 Pac. 178; *Cal. Empl. Comm. v. Los Angeles Down Town Shopping News Corp.* (1944, 24 Cal. (2d)

421, 150 P. (2d) 186; 30 *Cal. Law Review* 57, 63; 27 *Am. Jur.* 486; 42 *C. J. S.* 639.) Nearly all contracts for the performance of work reserve to the employer a certain degree of control. But control in this connection means complete control or the full and unqualified right to control and direct details of or means by which the work is to be accomplished. (13 *Cal. Jur.* 1020; *Flickenger v. Industrial Acc. Comm.*, 181 Cal. 425, 184 Pac. 851; *James McClatchy Publishing Co.*, 16 Cal. App. (2d) 131, 60 P. (2d) 342.

Appellant stresses that his employment contract was oral and terminable at will and that appellees had the power thereby to control the means and methods by which he would perform his services. (App. Br. p. 32.) By the same token, it may be argued that the appellant likewise could terminate his services and employment at his whim and fancy, thus negativing any control that appellees might have by virtue of this fact. Respectable authority has held that the right to discharge at will is just as consistent with the theory of an independent association as with the relationship of master and servant. (*Royal Indemnity Co. v. Industrial Acc. Comm.* (1930), 104 Cal. App. 290, 285 Pac. 912; 20 *A. L. R.* 763; *U. S. v. Standard Oil Co.* (1919), 258 Fed. 697; *Donlon Bros. v. Ind. Acc. Comm.* (1916), 173 Cal. 250, 159 Pac. 715.) Under any or all circumstances, it is submitted that the right to discharge at will is not controlling, but is merely one factor to be weighed along with other facts and circumstances of each individual case.

In the instant case, there is abundant undisputed evidence to support the correctness of the District Court's finding to the effect that Appellant's status was that of

an independent contractor. Appellant was paid on a commission basis. [R. p. 52.] He was free to solicit orders in whatever time and manner he chose and from whatever customers he selected. [R. pp. 79-80.] He determined his own hours and place of work, his sales routes, and employed whatever methods of salesmanship he desired. [R. pp. 79-82, 57.] He was not required to spend any particular time in his sales work. [R. p. 57.] Appellant had the unrestricted right to sell articles manufactured by other companies and could perform any other work for other persons at the same time as he sold for appellees. [R. p. 82.] Appellant used his own private automobile, and paid for all of his own expenses incurred in the making of sales or solicitation of orders. [R. pp. 58, 73-74.] It was not necessary that appellant be at appellees' office on any particular day or for any particular hours, and his visits to appellees' place of business were always informal and voluntary. [R. pp. 79, 106.] There was no sales quota that appellant had to satisfy or fulfill. [R. p. 67.] There was no withholding of social security tax, unemployment compensation, or any moneys whatsoever, from appellant's commissions.

The foregoing facts very clearly and overwhelmingly indicate that the appellant had exercised his own discretion with complete freedom in performing his services; that appellees exercised no direction or control over the manner in which appellant chose to perform his work, and appellant was responsible to appellees only as to the results of his work.

It follows that the finding of the District Court to the effect that appellant was an independent contractor was

correct and well substantiated by the evidence. And for purposes of this appeal, such finding is presumptively correct and should not be set aside nor disturbed unless clearly erroneous. (*Federal Rules of Civil Procedure,* Rule 52a; *Bolander et al. v. Godsil et al.* (9 C. C. A.), 116 F. (2d) 437; *Occidental Life Insurance Co. v. Thomas,* (9 C. C. A.), 107 F. (2d) 876.)

II.

Appellees' Good Faith Offer to Grant to Appellant the Exclusive Salesmanship of Appellees' Products in the City of Los Angeles Constituted an Offer to Restore Appellant to a "Position of Like Seniority, Status and Pay" and Thereby Fulfilled Their Obligations Under the Re-Employment Provisions of the Act.

Section 8(b) of the Selective Training and Service Act requires that:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employers circumstances have so changed as to make it impossible or unreasonable to do so * * *."

The language of the statute is in the disjunctive, and the natural and reasonable interpretation would seem to be that a restoration to either his former position or to a position of like seniority, status and pay, would satisfy the employer's obligation under the statute. Of course, if the employer's circumstances have so changed as to make it impossible or unreasonable to do either, the employer is relieved from such responsibility entirely. It is submitted that any other interpretation strains and does

violence to the statutory language and its clear intention.

The words "a position of like, seniority, status and pay," have been authoritatively construed to mean "a position, which, though not necessarily identical in every respect, is substantially equivalent to the veteran's former position on the basis of seniority, status and pay." (*Section 301.7, Handbook of the Veterans Assistance program of the Selective Service System.*) It has also been held that "position" within the meaning of this section means the employment and not the particular job the employee was performing. (*Morgan v. Wheland Co.*, D. C. Tenn. 1946, 66 F. Supp. 439.)

It remains therefore to establish that appellees' offer to restore appellant to the exclusive salesmanship of the Los Angeles territory constituted a position of "like seniority, status and pay." It would appear that such offer was unquestionably a position of like seniority and status. Appellant's primary objection is that the territory of Los Angeles (in his opinion) was and is not so desirable from the standpoint of pay. [R. pp. 71-72.] It should be observed however, in this respect, that the appellant had no personal knowledge or acquaintance with either the "city" or so-called "out of town" territory for approximately three and one half (3½ yrs.) years immediately preceding his petition, and his information as to the comparative potential earnings in the two territories as of the time of his petition was hearsay. [R. p. 104.]

From the standpoint of "pay" appellant would have received the same commissions on goods, wares and merchandise sold as he did prior to his entry into military service, and it is submitted that this is all that is required

by the Act of the employer in restoring a veteran to his former position or to a position of like seniority, status and pay. It is quite clear from the record, that when substracting and deducting appellant's admitted expenses of from $50.-$75.00 per week [R. pp. 73-74], from his commissions and earnings [See Exhibit "B," R. pp. 17-19], appellant operated at a substantial net loss. It is probable ,in view of the marked rise in the cost of living since 1943, that appellant's expenses would now be proportionately higher if he were to travel the same territory as he did previously. But Appellant is now expecting and insisting that the earnings of the salesman who replaced him, Ben Harris, is the proper basis and criteria for judging what he would have earned if he were restored to his former territory. Such a conclusion is in the realm of speculation. The District Court's proper answer to such contention was:

> "The Court does not believe that is a proper comparison and not as logical a comparison as the commissions received by the petitioner himself in the same territory. One salesman may be much more active, agressive, and be a much better salesman than another." [R. p. 112.]

The District Court took judicial notice of the unprecedented expansion of building in the Los Angeles area since petitioner entered the armed services in February, 1943, the marked increase in population and number of dwelling units in the community. [R. p. 117.] The Appellee Melvin R. Luster testified from personal knowledge that the Los Angeles territory was just as desirable as the "out of town" territory, and appellees' method of operation was assigned as a good and meritorious reason there-

for. [R. pp. 78-79.] These facts together with other evidence before the Court, were ample to support the Court's merely conditional finding that if appellant had accepted the territory of Los Angeles, he would have been restored to a position of "like seniority status and pay" similar to that held by petitioner prior to his entry into military service." [Finding 6, R. p. 26.]

Appellant places much emphasis on the case of *Levine v. Berman* (C. C. A. 6, May 6, 1947), and insists that under the foregoing decision, it is mandatory under the act to restore a salesman to his exact and identical sales territory. (App. Br. pp. 34, 37-38.) It is submitted that the *Levine* case, *supra*, is not controlling, and can be distinguished from the instant case upon its facts. In that case the facts were that prior to his entry into military service the salesman in question had an exclusive territory at a commission of 10% and with no limitation on the amount of merchandise which could be sold. During the war years, the employer had discontinued certain of its lines. Upon his discharge from military service, the veteran was offered employment in a smaller territory and at a reduced commission of 7½% on a limited sales allotment. The District Court held that re-employment in the former territory was unreasonable due to the changes in the employer's circumstances, and that the employer's offer to restore the veteran to another territory with changed terms fulfilled his obligations under the Act. The Circuit Court in ordering the restoration of the veteran to his former territory merely held that the District Court's finding did not show that re-employment of the veteran in the former territory and at the same commission was unreasonable.

III.

Appellant Has Suffered No Damage for Los of Commissions or Profits Contemplated by Section 8 (e) of the Selective Training and Service Act of 1940, as Amended.

It was held in the case of *Kay v. General Cable Corp.*, D. C., N. J., 1945, 59 F. Supp. 358, that the provision of subsection (3) of this section to the effect that an employer wrongfully denying reinstatement to a veteran shall compensate him for loss of wages or benefits because of such action is not designed as a penalty, but primarily to aid a veteran who, until he has been reinstated, is unable to establish himself as a wage earner. It was also held in that case that where a veteran, notwithstanding an employer's refusal to restore him to his former position as required by this section, is able to pursuse his trade or profession and actually does so, the veteran's situation is not of the type which this section is primarily intended to alleviate, and compensation should be determined accordingly, although the veteran may remain within the protection of this section.

Appellant argues that the doctrine of "mitigation of damages" is inapplicable and ought not be indulged in by the Courts in re-employment cases. (App. Br. pp. 41-43.] It is submitted, that if the Court were to accept this argument, it would do so in direct conflict with the pronounced policy and purpose of the Act as well as with well settled and accepted authority to the contrary.

The overwhelming weight of authority favors and supports the doctrine of "mitigation of damages," sometimes also referred to as "the rule of avoidable consequences."

One who is injured by wrongful or negligent act of another, whether by tort or breach of contract is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage. *Williston on Contracts,* section 1359; *Restatement of Contracts,* Section 336; 15 *Am. Jur.* 420; 25 *C. J. S.* 499; *United States v. U. S. Fidelity and G. Co.,* 236 U. S. 512, 59 L. Ed. 69, 35 S. Ct. 298; *Schultz v. Town of Lakeport,* 5 Cal. (2d) 377, 55 P. (2d) 485, 108 *A. L. R.* 1168.) Nothing in the Act indicates that it was designed to permit that which was intended as a shield for a veteran's economic protection and rehabilitation to be converted by him as a sword to arbitrarily impose a severe penalty on employers, who irrespective of good faith and intentions have wrongfully failed to restore the veteran to his former position.

Accordingly, in the interpretations given the Act, it has been held that a veteran seeking a sum equivalent to loss of wages on the ground that the employer wrongfully refused to re-employ him after his discharge, must have made a bona fide attempt to secure other work to mitigate damages. *Houghton v. Texas State Life Insurance Co.,* D. C., Texas, 1947, 68 F. Supp. 21.) It has likewise been held that the provisions of the section applicable to compensation to a veteran for loss of wages suffered are economic rather than penal, and hence an employer is entitled to credit earnings made by the veteran during the time the employer is liable for compensation for refusing to re-employ the veteran. (*Dacy v. Bethlehem Steel Co.,* D. C., Mass., 1946, 66 F. Supp. 161.) So a discharged veteran, who should have been restored to his former

employment as of January 1, 1946, was entitled to recover from his employer the amount which he would have received in such employment between January 1 and June 1, 1946, the date when the employer was ordered to reemploy veteran, *but less rehabilitation pay received from the United States and money earned in other employment between January 1 and June 1, 1946.* (Italics added.) (*Salter v. Becker Roofing Co.,* D. C., Ala., 1946, 65 F. Supp. 633.)

It has been heretofore established that appellant, for the entire period of time during which he acted as appellees' salesman, from 1941 to 1943, operated at a substantial net loss. In contrast, after refusing to accept the Los Angeles territory offered him by appellees, appellant worked for the Los Angeles Chair Co. at a salary of $150.00 per week or in excess of $600.00 per month and there was evidence that he received additional compensation for miscellaneous expenses, as he testified that he had received $100.00 for such purpose during September, 1946. [R. pp. 60-61.] From April, 1946 to and including the date of the trial, appellant would thus have earned in excess of $3000.00 net, without deduction of any kind. Yet the appellant would now wish the Court to speculate and assume that he would have earned the same or greater amount that appellees' salesman in his former territory, Mr. Harris, had earned for the same period of time, and that he is therefore entitled to the difference as compensation or damages. For obvious reasons, such reasoning is without merit.

The District Court was well fortified in logic, principle and authority in holding that appellant suffered no loss of "wages or profits" within the meaning of the act.

Conclusion.

From the evidence, the District Court was correct in finding and holding that appellant's status was that of an independent contractor. As such, appellant was not in a "position in the employ" of appellees prior to his military service and by reason thereof not entitled to the re-employment benefits of Section 8 (b, c, e) of the Selective Training and Service Act of 1940, as amended. Assuming and in the event that the Court reverses the District Court in finding that appellant was "in the employ" of appellees and thus entitled to the protection of the Act, it is submitted that appellees in good faith offered to grant to appellant the exclusive salesmanship of their products in the Los Angeles territory, and that such offer constituted a position of "like seniority, status and pay" and fulfilled appellees' obligation under the Act. The evidence and authority clearly establish that under any or all circumstances, appellant suffered no loss of wages or profits attributable to appellees or recoverable under the Act.

It is respectfully submitted, by reason of the foregoing, that the judgment of the District Court, should be affirmed.

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